



Office of
the Schools
Adjudicator

DETERMINATION

Case reference: LAN70

Applicant: Cheshire East Council

Application: Transfer of land from Cheshire East Council to the governing board for Malbank School and Sixth Form College, Nantwich, Cheshire

Date of direction: 13 March 2019

Direction

Under the powers conferred on me by regulation 7 of and Schedule 6 to The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land from Cheshire East Council to the governing board of Malbank School and Sixth Form College consequent upon the school becoming a foundation school shall include the strip of land on the eastern side of the school as described in detail in this determination and as shown in the attached plans.

The Application

1. Cheshire East Council (the local authority) wrote to the Office of the Schools Adjudicator in a letter dated 26 February 2016 to request resolution with regard to a dispute over the ownership of land between the local authority and the governing board for Malbank School and Sixth Form College (the governing board) following Malbank School and Sixth Form College (the school) becoming a foundation school without a foundation in 2006.
2. Although the school became a foundation school on 1 April 2006, when the land held and used for the purposes of the school fell to be transferred by operation of law from the local authority to the school's governing board, no agreement has been reached about whether or not a disputed area should be included in the transfer and therefore the transfer of the land has not been formalised. The local authority has insisted that a disputed area, a strip of land on the eastern side of the school, should be included in the land transferred, but the governing board has resisted that view.

Jurisdiction

3. Under the terms of regulation 7 of and Schedule 6 to the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 (the 2007 Regulations), the prescribed land transferred to and vested in the governing board, pursuant to the school becoming a foundation school on 1 April 2006. Failing local agreement, either the local authority or the governing board might apply to the Adjudicator for a direction

as to whether any land should be excluded from the transfer.

4. I am mindful that these regulations have been superseded by the School Organisation (Prescribed Alterations to Maintained Schools (England) Regulations 2013 (the 2013 Regulations) which came into force on 28 January 2014, but this legislation was enacted after the school became a foundation school and the dispute occurred. Paragraph 8(2) of the 2013 Regulations explains that the 2007 Regulations continue to apply in relation to proposals, such as the one in this case, published by a governing body before 28 January 2014.

5. I am satisfied that I have jurisdiction to consider this matter under the powers conferred on me

Procedure

6. In considering this matter I have had regard to all relevant legislation and guidance. I have considered all papers put before me including:

- a. the application letter from the local authority dated 26 February 2016 which included documentation and plans with regard to land registration, previous agreements, draft agreements and deeds of grant and easement;
- b. the response of the governing board to the local authority's application and further responses from the governing board and the local authority to the various communications made since the referral was made including plans provided by the local authority and the governing board in January 2019; and
- c. information shared at a meeting on 25 April 2016 held at the school with representatives of the governing board and the local authority (the meeting). Those present examined the disputed area as part of the meeting.

Background

7. Cheshire County Council was dissolved on 31 March 2009 and Cheshire East Council was founded on 1 April 2009 and took on the responsibilities relevant for this determination. I will refer to 'the local authority' when referring to either of these bodies as the role has been the same.

8. Malbank School and Sixth Form College is situated on the western edge of the town of Nantwich. It changed category to become a foundation school on 1 April 2006 (the implementation date). On the implementation date, land held or used by the local authority for the purposes of the school immediately prior to the implementation date must by virtue of paragraph 2 of schedule 6 to the 2007 Regulations transfer to the trustees of the school or, if it has no trustees, to the governing board. The school is a foundation school without a foundation and consequently has no trustees, so the land fell to transfer to the governing board. There has been no argument that any of the land was held or used for purposes wider than that of the school or partly for

the purposes of the school and partly for other purposes.

9. At the meeting there appeared to be a consensus about what should transfer and what should not transfer and that this only needed to be put clearly in documentation for there to be a resolution. Unfortunately, there have been considerable delays in producing documentation in the nearly three years that have elapsed since the meeting, in plans or words, that both parties accepted and it finally became clear that there would not be a locally agreed resolution.

10. The referral and other documents from the local authority and the governing board refer to the disputed area as a culvert. In fact a culvert is, “*A tunnel carrying a stream or open drain under a road or railway,*” (Oxford English Dictionary). There is a culvert which goes under school buildings and both parties agree that this is clearly part of what should be the governing board’s property. I describe below the disputed area in more detail; there are also plans that show the area at the end of this determination. I will refer to the area under dispute, a strip of land on the eastern side of the school, as ‘the disputed area’ in this determination.

11. The disputed area is about 200 metres in length and less than a few metres wide at its widest point. I will describe it in two distinct sections although they are connected. The first section is the southern part and includes a section of an open watercourse. The second section is the northern part and is a strip of land to the west of the watercourse and does not, as I explain below, include the watercourse itself.

12. In the first section, water emerges from the culvert referred to above on the south eastern edge of the school site and streams north. On the eastern side of this watercourse is a housing estate which is situated on land sold by the local authority prior to the implementation date. It is my understanding from the documentation provided to me that the land sold by the local authority has its boundary in the centre of the watercourse for most of this first section. The housing estate is fenced off from the watercourse. The first section of the disputed area is about 125 metres long and extends from the centre of the watercourse to a fence put up by the school prior to the implementation date to separate the rest of the school site from the watercourse. For a few metres at the northern end of the first section the whole of the watercourse is in the disputed area together with a metre or so of land on the eastern side as shown in Plan A below.

13. The watercourse flows north for these 125 metres. It then flows under a footbridge. At this point the watercourse has a public right of way (the footpath) on its western border for about 75 metres. There is a drain into the watercourse of water from the school site in this area. The local authority and the governing board agree that for these 75 metres the watercourse, the footbridge and the footpath should not be part of the school. This non-disputed area is owned by another body not party to this case. The western edge of the footpath is grass and hedges. It is this area of grass and hedges which forms the second section of the disputed area.

14. The governing board raised other matters of dispute regarding the parameters of other areas of the school site in recent correspondence. I have not considered these matters as they have not been formally referred to me.

15. The local authority provided me with 27 documents pertaining to the history of ownership of the school site and its immediate vicinity. There were several changes of ownership of parts of the school site and its surrounding area over a period of many years prior to the implementation date. Some of these 27 documents appear only to be available in black and white when the descriptions use colour and some are faded and unclear for other reasons probably relating to age and condition.

Consideration of case

16. Schedule 6 to the 2007 Regulations states in paragraph 2(2), which relates to an approved proposal that a community school should become a foundation school, that *“in such a case, any land which, immediately before the implementation date, was held or used by a local authority for the purposes of the community school must on that date transfer to, and by virtue of this paragraph vest in –*

- a. the trustees of the school, to be held by them on trust for the purposes of the school; or*
- b. if the school has no trustees, the governing body, to be held by that body for the relevant purposes.”*

This means that the question for me in this case is whether the disputed area was held or used by the local authority for the purposes of the school immediately before the implementation date.

17. The local authority's argument is in essence that the disputed area was held for the purposes of the school, is situated on school land and that this was the situation immediately prior to the implementation date and so should be part of the land transferred to the governing board consequent upon it becoming a foundation school.

18. In support of its case the local authority has also said, and the governing board has not disputed, that water drains into the watercourse from the school's land. The local authority said that this drainage saves the governing board £24,000 each year. The local authority said in its referral letter that it had offered the governing board a different way of approaching these costs and savings to cover maintenance and creating a capital reserve for any future major works. The governing board has said that these discussions came to nothing and that it has not been convinced with regard to the monies saved. The governing board acknowledges that it gets some benefit from the watercourse through water draining into it but that this benefit is shared with the housing estate.

19. I have not discussed these negotiations with either party as my jurisdiction is solely to determine whether the land was held or used for the purposes of the school immediately prior to the implementation date.

20. With regard to the first section of the disputed area the governing board said that a fence was raised between the areas the school uses and the watercourse before the implementation date. It said that the school did not use any of the land on the watercourse side of the fence prior to the implementation date and has not done so since. The governing board is concerned at the costs of maintaining a watercourse which is in effect a shared responsibility with a housing estate and at risk of fly tipping and similar. The governing board said that the watercourse is not part of the school site and never has been; and the maintenance costs of the watercourse would be an improper use of school funding.

21. I walked the disputed area with representatives of the parties at the meeting and those present had no knowledge of any maintenance having been required for the watercourse in the first section.

22. With regard to the second section of the disputed area, the governing board does not want the responsibility of maintaining the grass and hedges to the west of the right of way as this will create a cost with no benefit to the school as it said it has never made use of this land. The governing board was also concerned that ownership would bring problems of not being able to control the actions of others while having to maintain the property. The governing board further suggested that there is no clear physical boundary between the edge of the path and the hedges so if *“the School’s fence is used as a boundary line, then this is more pleasing to the Land Registry as it is a physical feature that is apparent from OS (Ordinance Survey) Mapping.”*

23. The local authority’s response to this was that, *“The Land Registry plans available online clearly show where the school title ends and the adjoining owners land starts.”* It also said that it would be very difficult for it to maintain the disputed area as *“it would be landlocked as CEC (the local authority) would not own any of the surrounding land.”* My role is not to determine which party would find it easiest or most cost effective to maintain the disputed area but whether the disputed area was held for the purpose of the school prior to the implementation date.

24. At the meeting the local authority said that the plans it had provided showing the proposed boundary at the footpath section were inaccurate and that it would provide an alternative plan clarifying this in a way which appeared to be to everyone’s satisfaction. Unfortunately this mutually agreed solution was not achieved. In short, no plan agreed by both parties showing an agreed understanding of the ownership of the land has been provided to me.

25. I have studied the 27 documents provided to me by the local authority that include official copies of register of title from the Land Registry. There have been various transfers of areas of land related to the school in the years up until 2006 and all the relevant information shows the boundary for the school in the disputed area was that as proposed by the local authority.

26. I have studied the documents provided to me and the case made by

the governing board. There was a fence put up, probably in the 1990s originally, to create security for the site. It is not uncommon to have a secure fence to prevent students leaving the site or part of the site when they should not and to prevent others entering the site or part of the site when they should not. Similarly, it is common practice in schools and, indeed, many other places to use fences to keep users away from dangerous places. The putting up of a fence does not, by itself, create a new legal boundary to a property. I note that it would not be practical or appropriate to have erected the fence in the middle of the watercourse.

27. I understand the governing board's reluctance to take on responsibility for land from which, with the exception of drainage, it does not use or gain any benefit. However, the evidence provided to me supports the view that the land was held by the local authority for the purposes of the school immediately prior to the implementation date. I have seen insufficient evidence to convince me that the disputed area was not held by the local authority for the purposes of the school. I have therefore decided that the disputed area, as described above and illustrated in the drawings provided by the local authority dated March 2018 and January 2019, should be transferred to the governing board. These drawings are appended to this determination to assist clarity.

Conclusion

28. I have considered all the evidence provided to me and the evidence satisfies me that the disputed area was held by the local authority for the school prior to the implementation date.

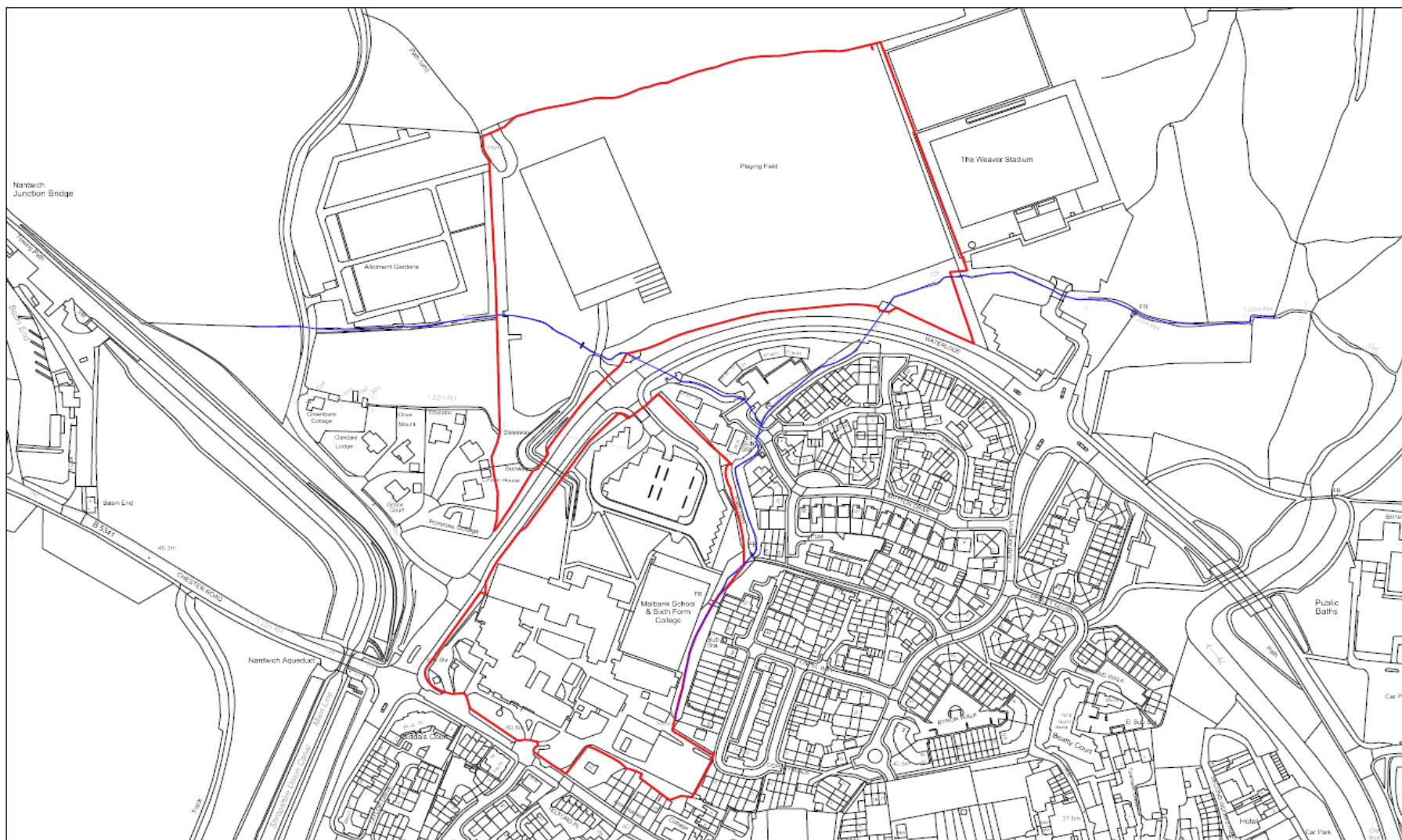
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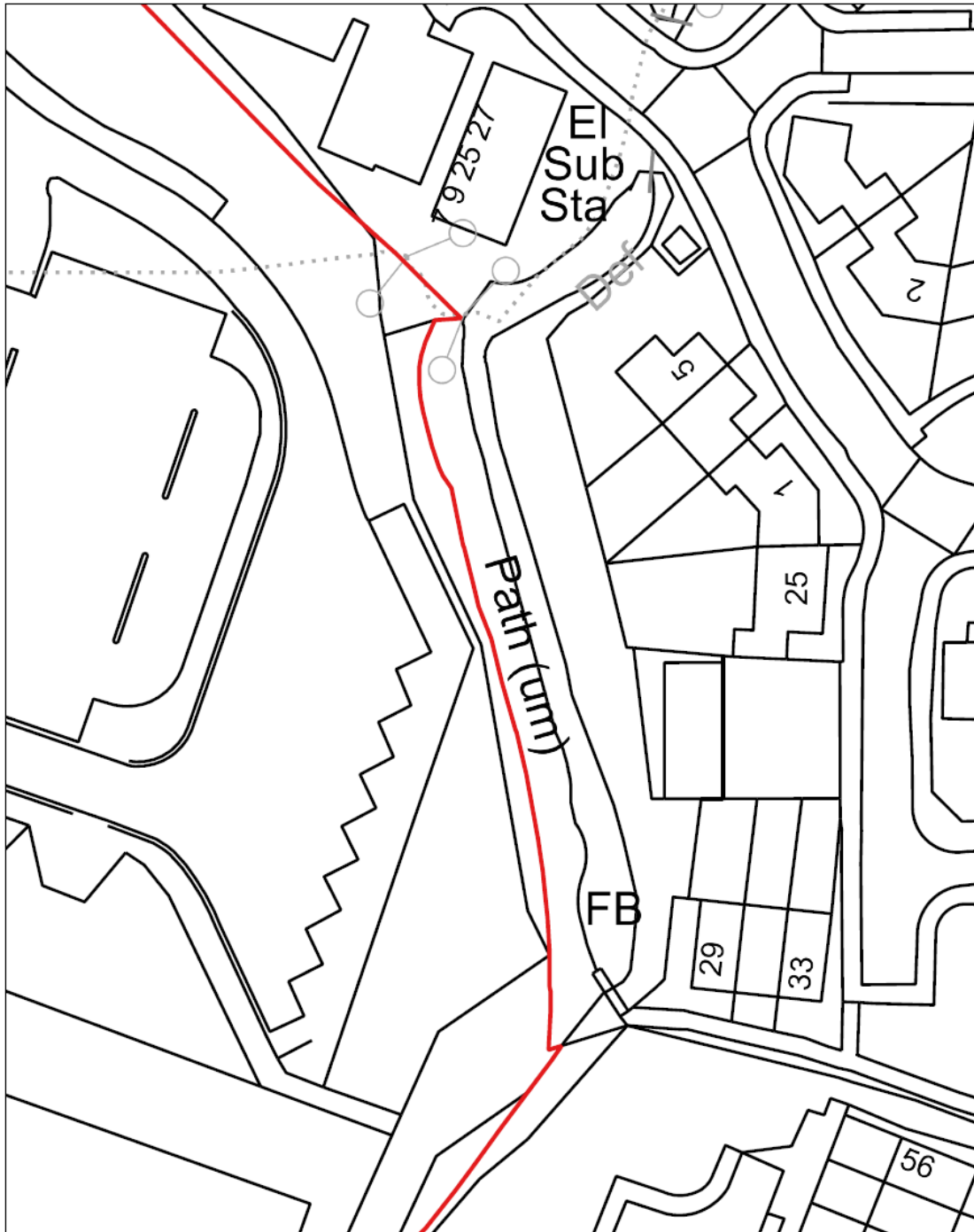
29. Under the powers conferred on me by regulation 7 of and Schedule 6 to The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land from Cheshire East Council to the governing board of Malbank School and Sixth Form College consequent upon the school becoming a foundation school shall include the strip of land on the eastern side of the school as described in detail in this determination and as shown in the attached plans.

Dated: 13 March 2019

Signed:

Schools Adjudicator: Deborah Pritchard





**Malbank School and
6th Form College - Plan B**

Ref: KW

Date: 28 January 2019

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